# UNITED STATES DISTRICT COURT
# FOR THE DISTRICT OF RHODE ISLAND

| | |
|---|---|
| THE PROBATE COURT OF THE CITY OF WARWICK, by and through JUDITH A. LAWTON, JUDITH GRANT, CAROL LINCOLN, JANICE LEFFINGWELL, JOYCE HENDRICKS, JOHN KIEPLER, as Executor of the Estate of Beverly Kiepler, JANICE FISHER, DAVID GILMORE and RAYMOND CYR,<br><br>Plaintiffs,<br><br>v.<br><br>BANK OF AMERICA CORP., as Co-Executor of the Estate of Magda Burt,<br><br>Defendant. | C.A. No. 07-239-S |

## REPLY TO PLAINTIFFS' OBJECTION TO DEFENDANT'S MOTION TO DISMISS

The Plaintiffs' objection to the Motion to Dismiss their complaint filed by the Defendant Bank of America Corp. fails to demonstrate any possibility of recovery on the claims raised by this suit brought in this court pursuant to the Consent Order, which authorized only a single action on the Executor's bond, and in which all parties expressly reserved all rights and defenses. Because the Plaintiffs have filed their motion to name the proper entity as Defendant, (to which Bank of America Corp. is not objecting) the Defendant, Bank of America, Corp. will respond to the substantive arguments raised by Plaintiffs.

### I. The Separate Counts For Breach Of Fiduciary Duty And Negligence Are Barred Because The Consent Order Did Not Authorize Such Claims And Because The Plaintiffs, Suing Only In Their Representative Capacity, Cannot Bring Such Claims.

It seems the Plaintiffs have misinterpreted the Bank's motion to dismiss the claims for breach of fiduciary duty and negligence as assertions by the Bank that a breach of fiduciary duty by an executor, whether intentional or "neglectful," is not recoverable on an Executor's bond. This is not the Bank's position.

The Bank agreed to the Consent Order, which authorized only a single action on the bond. In the course of litigating this single claim, it is expected that the Bank's actions as Executor will be carefully examined and if the Bank breached any fiduciary duty even if only through a failure to meet the applicable duty of care, the Bank acknowledges that such a breach may be recoverable on the Executor's bond.

The Bank objects to the independent counts for breach of fiduciary duty and negligence because the Consent Order did not authorize multiple independent claims brought by the Plaintiffs in their individual capacities. The Complaint, while brought by only nine of the ten beneficiaries who executed the Consent Order, was properly pled by those beneficiaries on behalf of the Probate Court for the City of Warwick. Each beneficiary may have had, at some point, a claim for possible breaches of fiduciary duty, but such claims are personal to the beneficiaries, and are the precise claims pending in the state courts that the Bank negotiated in good faith to avoid defending. The Consent Order did not merely transfer those claims to this court. Rather, the Consent Order substituted this action for the state claims. A claim for breach of fiduciary duty is not the same as an action on an executor's bond for liability stemming from a breach of fiduciary duty. Even though both claims will require proof of the same standard and will apply the same law, the action on the bond will bind all the beneficiaries, whereas the individual claims of breaches of fiduciary duties would address only the facts as they pertained to each beneficiary.

Furthermore, as pled by Plaintiffs in their representative capacity, the claim for breach of fiduciary duty fails to state a claim upon which relief may be granted because the Plaintiff is the Probate Court, to which no duties, fiduciary or otherwise, are owed, other than those set forth by statute. (R.I. Gen. Laws. § 33-17-1).

The independent negligence claim fails to state a claim for all of these same reasons and also because a claim for negligence does not lie against an executor of an estate. The duties owed to beneficiaries are well established and are not subject to the generalized standards that apply in standard negligence cases. Even in *Hanley v. Alarie*, 746 A.2d 125 (R.I. 2000) cited by plaintiffs, the court found that the executrix had breached her fiduciary duties, not that she had negligently caused injury. Her actions in failing to satisfy the duty of care she owed to the beneficiaries were a breach of her fiduciary duties, not negligence as negligence exists as an independent tort. *See Id.*

## II The Suit On The Bond Is Barred By The Statute Of Limitations Because The Beneficiaries Could Have Brought Suit On The Executor's Bond At Any Time After The Sale Of The Stock And Were Therefore Obligated To Do So Within The Applicable Statute Of Limitations Period.

Unlike many other state jurisdictions, the statute of limitations in Rhode Island begins to run when a cause of action accrues. *See Schock v. United States*, 56 F.Supp.2d 185, 190 (D.R.I. 1999). Pursuant to R.I. Gen. Laws § 33-17-25, a suit on an Executor's Bond may be brought at any time by any party interested in an estate. Section 33-17-25 states:

> **Suit for benefit of all interested in estate. –** A suit may also be brought on a bond for the benefit of all concerned in the estate at the instance of any party interested, who shall give surety for costs to the defendant on the writ, and satisfactory bond to the probate court securing the court against expenses and costs; in which case, indorsement that the suit is brought for the benefit of all interested in the estate shall be made upon the writ.

This provision is unique to Rhode Island and gives beneficiaries a cause of action whenever they feel aggrieved by the actions of an executor. The statute notably does not require that the executor be removed, or that the executor file a final account, or that an estate be finally closed. In Rhode Island, unlike the other jurisdictions discussed by Plaintiffs in their memorandum, suit may be brought at any time. If a claim has accrued such that it may be brought, then the statute of limitations must start to run. *See Martin v. Howard*, 784 A.2d 291, 299 (R.I. 2001) ("Generally a cause of action accrues and the applicable statute of limitations begins to run at the time of the injury to the aggrieved party."). To hold otherwise would be contrary to the very purposes of statutes of limitation, which exist to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Id.*

The issue of when a cause of action accrues on an executor's bond is an issue of first impression in Rhode Island. Because probate law is unique to each state, case law from other states is only persuasive to the extent that their probate statute provides, as Rhode Island's does, the right for an interested party to bring suit on an executor's bond at any time even while the estate is still open and the executor is still in place. The states in the cases cited by Plaintiff do not have this unique provision.

Alabama (whose probate law was analyzed in *Alexander v. Bryan*, 110 U.S. 414 (1884) and *Fretwell v. McLemore*, 52 Ala. 124 (1875)) had a statute that specifically addressed when a cause of action on an executor's bond could be brought. It was a statute of limitation, which also defined the time of accrual. It stated:

> actions against the sureties of executors for any misfeasance or malfeasance of their principal must be brought within six years after the cause of action has accrued, and not afterwards, the time to be computed from the act done or omitted by their principal, which fixes the liability of the surety.
>
> *Alexander*, 110 U.S. 414, 416 (1884).

In *Fretwell*, the Supreme Court of Alabama explained that an executor's failure to perform the duties required for the administration of an estate:

> often furnish cause for removal of the [executor] and the revocation of his authority. Of themselves they do not create a cause of action against, or fix the liability of the surety. Before any cause of action arises against the surety at law, and before the liability is fixed at law or in equity, there must be a judicial ascertainment of the default of the [executor].

*Fretwell*, 52 Ala. 124, 136 (1875).

Rhode Island does not have this requirement that the liability of the surety be fixed. In fact, interested parties are expressly authorized to sue on an executor's bond (on behalf of all interested parties) so long as surety is given to the defendant, and a bond is given to the Probate Court securing the court against expenses and costs. It is true, as the Plaintiffs mention in their objection, that these conditions were not addressed because the parties proceeded under the Consent Order. But an executor's consent is not required for an interested party to sue on an executor's bond in Rhode Island. The beneficiaries did not need the Consent Order to sue on the bond. They could have, at their own discretion, sued on the bond at any time without the Bank's consent so long as they (or any one of them) provided the required sureties.

The Tennessee case, *Townes v. Townes* 1988 Tenn. App. LEXIS 565 (1988) offers no different interpretation, as it simply finds that the Tennessee statute is substantially similar to the Alabama statute considered by the Supreme Court in *Alexander v. Bryan*. *Townes*, 1988 Tenn. App. LEXIS 565, * 7-8.

The District of Columbia case, *In Re Estate of Green*, 816 A.2d 14 (2003) is somewhat different in that the District of Columbia lacked any statutory provision as to when a cause of action on an executor's bond accrued. *Id*. at 17. The general rule was that "accrual is determined on a case-by case basis." *Id*. But, "an action accrues and the statute of limitations begins to run when the suit could first be initiated." *Id*. After analyzing the statute describing the scope of the executor's duties, (and finding largely that it did not provide much guidance) the court held that a suit on the bond could first be brought after the closing of the estate because the bond continues to be in force until the closing of the estate. *Id*. at 20. This holding by the court in Green however, is inapposite to the situation here, where Rhode Island's statue expressly allows such claims to be brought while an estate is still open.

Because the case law from other jurisdictions does not address the situation in Rhode Island, where R.I. Gen. Laws § 33-17-25 expressly empowers interested parties to bring suit on an executor's bond while an estate is still open, it is not persuasive. The general statute of limitations period begins to run on actions brought on an executor's bond from the time that the action could first have been brought. In Rhode Island, this can be at any time during the administration of an estate. In this case, all actions by the executors with respect to transaction at issue in this case (the sale of closely held corporation stock pursuant to order of the probate court) were complete by November 6, 1995. No objections were raised to the sale at that time. No suit was brought on the executor's bond. This suit was filed July 12, 2007, more than eleven (11) years after the actions at issue. It is therefore time barred.

**III. Equitable Estoppel Does Not Apply To Prevent The Bank's Assertion Of The Statute Of Limitations Defense Because The Bank Expressly Reserved All Rights And Defenses In The Consent Order.**

The Plaintiffs argue that because the Bank did not bring suit against itself, agree to step down as executor or consent to be sued prior to the current Consent Order, that the Bank prevented the beneficiaries from instituting this action. This argument defies reason. R.I. Gen. Laws § 33-17-25 does not require that the suit on an executor's bond be brought by the executor, or with the executor's consent. The statute would, for all practical purposes, be rendered meaningless if such consent was required.

To the extent that Plaintiffs claim that the Bank should be equitably estopped from asserting a statute of limitations defense because they were unaware that the Bank meant to reserve the right to do so, such a claim must not be given any weight. The Bank did nothing to induce such ignorance in the Plaintiffs. In fact, the Bank made a point of expressly reserving all rights and defenses in the Consent Order. The Bank asserted a statute of limitations defense in *Lawton v. Bank of America Corp.*, C.A. 05-503S so the Plaintiffs had every reason to think that this would be a defense asserted by the Bank in any action filed thereafter.

Had the reservation of all defenses not been a term of the Consent Order, the Bank would never have agreed to it. The Bank indeed did seek to streamline the litigation of this matter, but disagrees with the Plaintiffs' assertion that if the Bank is successful on this motion that each beneficiary will be free to resume litigation of their individual claims. The effect of this case on other litigation, however, is not presently before this court.

Simply put, the Consent Order expressly reserved all rights and defenses available to all parties. The statute of limitations was a defense that had been asserted by the Bank prior to the execution of the Consent Order. In negotiating the Consent Order, the Plaintiffs never requested and the Bank never agreed to waive this defense. Any claim that the Bank should be equitably estopped from asserting this defense, because it refused to step down as executor, sue itself, or because it reserved the right to assert all defenses, including the statute of limitations is without merit.

**IV. Judicial Estoppel Does Not Apply To Prevent The Bank's Assertion Of The Statute Of Limitations Defense As The Bank Expressly Reserved All Rights And Defenses In The Consent Order.**

In agreeing to the Consent Order, the Bank did indeed seek to have all the various suits against it considered in one proceeding, but it only agreed to do so with the condition that all rights and defenses were preserved. The Bank had previously raised the statute of limitations defense and never represented to any court that it would waive that defense by consenting to the single action on the bond. The Bank has never disputed the validity of the Consent Order, and the Bank did and will continue to "aggressively defend" the validity of *all* of its terms.

Judicial estoppel applies to prevent a litigant "playing fast and loose with the courts, …from asserting a position inconsistent with a position he or she took in an earlier proceeding. *Schock v. United States*, 56 F.Supp2d 185, 192 (1999). Nothing that occurred in the Bank's defense of the Consent Order, in collaboration with the Plaintiffs, is inconsistent with the Bank's present assertion of the statute of limitations defense. The Consent Order clearly contains the reservation of all defenses. The Bank had previously asserted the same defense and never agreed to waive it. The Bank has never agreed to be sued in any forum without the opportunity to assert all defenses available to it. On this, it has been completely consistent, and for that reason, judicial estoppel does not apply.

**V. Conclusion**

For all of the reasons stated herein, Defendant, Bank of America Corp. respectfully requests that this court grant its Motion and dismiss all three counts of the Plaintiffs' Complaint, with prejudice.

Respectfully submitted,

BANK OF AMERICA CORPORATION

By Its Attorneys,

PARTRIDGE SNOW & HAHN LLP

/s/ Carolyn P. Medina
Steven E. Snow (#1774)
Carolyn P. Medina (#7109)
180 South Main Street
Providence, RI 02903
(401) 861-8200/(401) 861-8210 FAX
ses@psh.com
cpm@psh.com

Date: October 22, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Reply to Plaintiffs' Objection to Defendant's Motion to Dismiss was filed with the Clerk of the United States District Court for the District of Rhode Island this 23rd day of October, 2007 and is available for viewing and downloading to the following ECF registered counsel of record:

Karen A. Pelczarski, Esq./Blish & Cavanagh, LLP
Staci L. Kolb, Esq./Blish & Cavanagh, LLP
Joseph A. Keough, Jr., Esq./Keough & Sweeney, Ltd.
Mark A. Sjoberg, Esq./Sjoberg & Votta Law Offices
Jennifer A. Niedzinski, Esq./Sjoberg & Votta Law Offices
Richard Tallo, Esq.
Thomas Pearlman, Esq.
James A. Currier, Esq.

/s/ Carolyn P. Medina

944980_1/4150-24